(4)

No. 06-7949

FILED
JUL 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR
(*Counsel of Record*)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

July 26, 2007

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTERESTS OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT. 2
ARGUMENT 5

I. BECAUSE THE SENTENCING GUIDELINES REGULARLY CALL FOR UNREASONABLE SENTENCES THAT VIOLATE THE PURPOSES OF SENTENCING, A SHOWING OF EXTRAORDINARY CIRCUMSTANCES SHOULD NOT BE REQUIRED TO JUSTIFY A NON-GUIDELINE SENTENCE. 7

A. The Guidelines Are Unreasonable Because They Call For Excessively Harsh Sentences Compared to Sentences Imposed in the Pre-Guideline Era. 10

B. The Guidelines Are Flawed Because They Mandate Statutory Maximum Punishments In Violation of the Parsimony Principle 18

C. The Extraordinary Circumstances Test Would Discourage Probation And Non-Prison Sentences And Violate The Congressional Directive That Guideline Sentences Should Reduce The Likelihood Of Prison Overcrowding. . . . . .

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases:

Chamber of Commerce v. Securities and Exchange Comm'n, 412 F.3d 133 (D.C. Cir. 2005) 17
Envtl Def. Fund, Inc. v. EPA, 898 F.2d 183 (D.C. Cir. 1990) 17
FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981) 18
Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) 18
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 9
United States v. Adelson, 441 F. Supp. 2d 506 (S.D.N.Y. 2006) 23
United States v. Booker, 543 U.S. 220 (2005) . . . . . *passim*
United States v. Green, 346 F. Supp. 2d 259 (D. Mass. 2004) 16
United States v. Lee, 887 F.2d 888 (8th Cir. 1989) 18
United States v. Likens, 2007 U.S. Dist. LEXIS 38925 (D. Iowa 2007) . 21
United States v. McNab, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004) 15, 16
United States v. Rita, 127 S. Ct. 2456 (2007) . . . . . *passim*
United States v. Thurston, 358 F.3d 51 (1st Cir. 2004), *cert. granted*, 543 U.S. 1097 (2005) 19, 20
United States v. Thurston, 456 F.3d 211 (1st Cir. 2006), cert. pending, No. 06-378 . . . . . 21, 22

APPENDIX

Constitution, Statutes, and Regulations:

Sentencing Reform Act of 1984 3

18 U.S.C. § 371 20
18 U.S.C. § 3553(a) . . . . . *passim*
18 U.S.C. § 3553(a)(2) 6
18 U.S.C. § 3553(a)(2)(A) 16
18 U.S.C. § 3553(a)(3) 2, 23
18 U.S.C. § 3553(a)(4) 6
18 U.S.C. § 3553(a)(5) 6
18 U.S.C. § 3553(a)(6) 6
18 U.S.C. § 3553(b) 4, 7, 8
18 U.S.C. § 3553(f) 13
18 U.S.C. § 4205(a) (repealed 1984) 14
18 U.S.C. § 994(g) 23
28 U.S.C. § 994(h) 22
28 U.S.C. § 994(j) 10
28 U.S.C. § 994(m) 15
28 C.F.R. 2.20 14
28 C.F.R. 2.20, Chapter 12 Miscellaneous Offenses . 14
USSG §2J1.6 18
USSG §5C1.2 13
USSG §5G1.1(a) 19

Legislative Materials:

130 Cong. Rec. S542-43 (daily ed. Jan. 31, 1984) . . 11
S. Rep. No. 225, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 . . . . 7, 11

Miscellaneous:

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988) 11, 16

Paul J. Hofer & Barbara S. Meierhoefer, *Home Confinement: An Evolving Sanction in the Federal Criminal Justice System*, Federal Judicial Center (1987) 24

Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Policy Analysis, Nov. 1, 2002 . 16

Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, Legal Times (Feb. 16, 2004) 15

Punishments Imposed on Federal Offenders (Federal Judicial Center 1986) 12

Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 124 (1998) . . . 7

U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* 23

The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey (1997) 13

U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver *Summary of Criminal Prosecutions Resulting From Environmental Investigations* (May 31, 1991) 17

Ronald F. Wright, *Sentences, Bureaucrats, and the Administrative Law, Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 3 (1991) 18

Transcript of Senate Judiciary Committee hearings on the nomination of Alberto R. Gonzales to be Attorney General, as transcribed by Federal News Service, http://sentencing.typepad.com/sentencing_law_and_policy/files/gonzales_hearing_excerpts_part_1.doc 11-12

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a national non-profit public interest law and policy center based in Washington, D.C., that has supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts, promoting a limited and accountable government, separation of powers, and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment approximately 20 years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of various guidelines. WLF has also taken the Commission and its advisory committees to task and to court for failing to operate in an open and transparent manner in the formulation of Commission policy. *See Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

In particular, WLF has been critical of the Guidelines and their application because they call for excessively harsh prison sentences, particularly with respect to minor regulatory infractions, when probation would be more appropriate. In addition, WLF filed a briefs in *United*

---

[1] Pursuant to S. Ct. R. 37.6, *amici* hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than *amici* and their counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, all parties have consented to the filing of this brief.

States v. Booker, 543 U.S. 220 (2005), *United States v. Rita*, 127 S. Ct. 2456 (2007), and other Sentencing Guideline cases in the lower courts, arguing that the Guidelines are unconstitutional, flawed, generate unreasonably harsh sentences, and aggravate rather than mitigate sentencing disparity. *See, e.g., Thurston v. United States*, 358 F.3d 51 (1st Cir. 2004), *cert. pending*, No. 06-378.

WLF's Legal Studies Division also publishes relevant articles on criminal law and sentencing issues. *See, e.g.*, Brian M. Heberlig, *Avoiding Disparities Between Sentences Of Co-Defendants Is A Legitimate Sentencing Goal* (WLF Legal Opinion Letter, Apr. 7, 2006).

The Allied Educational Foundation (AEF) is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues and has appeared as *amicus curiae*, along with WLF, in numerous cases, including *Booker, Rita,* and *Thurston*.

SUMMARY OF ARGUMENT

The overarching goal of sentencing is to select and impose a just punishment that achieves the principles of deterrence, retribution, and rehabilitation. Congress mandated that sentencing judges, when considering what punishment to impose in a particular case, carefully consider the nature and circumstances of the offense *and* the characteristics of each individual offender, in addition to the other sentencing factors specified in 18 U.S.C. § 3553(a), including the "kind of sentences available." 18 U.S.C. § 3553(a)(3).

Congress also mandated that the sentence ultimately imposed must be one that "is sufficient, but not greater than necessary" to achieve the purposes of punishment. 18 U.S.C. § 3553(a). This so-called parsimony principle forbids a civilized society from inflicting gratuitous punishments on its citizens.

The Sentencing Reform Act of 1984 (SRA) altered sentencing policy in two major ways. *First*, it abolished the parole system and established a determinate sentencing scheme. No longer would the typical prisoner convicted of a non-violent crime be eligible for and usually receive parole after serving one-third of the sentence imposed by the court.

As will be further discussed, *infra*, an appreciation of this fundamental change in sentencing practice from a parole system to a determinate sentencing scheme is crucial for a proper understanding of the unreasonableness of many Guideline sentences, and why an extraordinary circumstances test for reviewing the reasonableness of a below-Guideline sentence should be rejected. As a general proposition, any Guideline sentence should be multiplied by three in order to fairly calculate what a comparable pre-Guideline sentence would have been. For example, in this case, Petitioner Gall's Guideline sentence of 30-37 months translates into a harsh pre-Guideline sentence of 90-111 months, or 7 1/2 to over 9 *years* for this non-violent first offender. *Amici* submit that such a lengthy sentence would not likely have been considered, let alone imposed, in the pre-Guideline era. In short, there is no good reason to require a showing of extraordinary circumstances for imposing a non-Guideline sentence, and many reasons not to. This is true particularly when reviewing the reasonableness of a sentence of probation and other non-

prison alternative sentences, for which the Guidelines unfortunately and impermissibly exhibit a strong aversion.

Second, the SRA created the Sentencing Commission, an agency which devised a set of fairly rigid Guidelines that sentencing courts were required to follow in determining a sentence. 18 U.S.C. § 3553(b). Sentences imposed under the Guidelines often resulted in excessive punishments that fit neither the crime nor the offender, thereby doing great violence to the parsimony principle.

Prior to this Court's decision in *Booker*, sentencing courts were sometimes forced against their better judgment to "stack" or stretch the sentences for multiple charges against a defendant by making the sentences run consecutively instead of concurrently (as they otherwise would have done in the pre-Guideline era) in order to meet the harsh Guideline sentence. In other cases, the sentences called for in the Guidelines were so severe that they exceeded the statutory maximum sentence permitted for the offense. In those cases, the court was required to lop off the end of the Guideline sentence to make it fit within the statute's maximum term of imprisonment. This Procrustean approach to sentencing fundamentally subverted the principle of making the punishment fit the crime and the offender; instead, the Guidelines effectively forced the crime and offender to fit the punishment.

Further, the unduly harsh sentences, often called for by the Guidelines in this and other cases, give short shrift to the § 3553(a) factors and the parsimony principle. Requiring a district court to show extraordinary circumstances on a sliding or proportional scale the further the sentence imposed by the court varies from a Guideline sentence impermissibly elevates the Guidelines to a

preferred status that they do not deserve and is not allowed under *Booker* and *Rita*. This is particularly true if the proportionality test were applied by appellate courts when reviewing probationary and other non-prison alternative sentences, such as home confinement, community service, fines, restitution, or a combination thereof. In all of those cases, the sentence imposed would constitute, as the court of appeals below found in this case, a 100 percent departure from any Guideline sentence calling for any length of prison term, and thus be prone for reversal.

Thus, the extraordinary circumstances test would lead, as it did here, to impermissible reversals of probationary and other non-Guideline sentences. That result would be tantamount to a *de novo* appellate review of the sentence as opposed to a deferential abuse of discretion standard that this Court required in *Booker* and *Rita*.

ARGUMENT

I. BECAUSE THE SENTENCING GUIDELINES REGULARLY CALL FOR UNREASONABLE SENTENCES THAT VIOLATE THE PURPOSES OF SENTENCING, A SHOWING OF EXTRAORDINARY CIRCUMSTANCES SHOULD NOT BE REQUIRED TO JUSTIFY A NON-GUIDELINE SENTENCE.

Congress mandated in 18 U.S.C. § 3553(a) that the sentencing court "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of punishment] set forth in paragraph (2) of this subsection," *viz.*, "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense; (B) to afford adequate [general]

deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant [specific deterrence]; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2) (emphasis added). The directive that the sentence be "sufficient, but not greater than necessary" to comply with these sentencing purposes is the parsimony principle, an important hallmark of a civilized society that does not inflict arbitrary, wanton, or gratuitous punishment on its citizens.

Congress also commanded that in determining the appropriate sentence, the judge must consider six other sentencing factors, including the appropriate Sentencing Guideline, 18 U.S.C. § 3553(a)(4), and any pertinent policy statement issued by the Sentencing Commission, § 3553(a)(5).[2] While *all* the factors listed must be considered by the Court, no special weight is required to be given to the Guidelines or any Commission policy statement. The end result must be a sentence chosen thoughtfully, as it was here, that is sufficient, but not greater than necessary, to serve the purposes of sentencing specified in § 3553(a)(2), and supported by a statement of reasons.

---

[2] The other four factors specified in 18 U.S.C. § 3553(a) that must be considered by the sentencing court are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; * * *
>
> (3) the kinds of sentences available; * * *
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

One of the rationales for the SRA was the perception that judges' broad sentencing discretion resulted in a fragmented sentencing system that produced unwarranted disparity in sentences and a lack of fairness. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-190 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220-3373.[3]

When the SRA abolished parole and established a determinate sentencing scheme, the sentence imposed was essentially the sentence served. Wholly independent of the truth-in-sentencing reform, left untouched by *Booker*, Congress also established the Sentencing Commission to promulgate Sentencing Guidelines to achieve a measure of uniformity by effectively dictating the sentence within a narrow range to be imposed on a defendant convicted of a federal offense. 18 U.S.C. § 3553(b). In so doing, application of the Sentencing Guidelines under § 3553(b) in a particular case would trump any sentencing decision reached solely after considering the seven factors in § 3553(a), even if the resultant Guideline sentences were unduly harsh (as they often were), and in clear violation of the parsimony principle.

All of that changed when this Court ruled in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines violated a defendant's Sixth Amendment rights,

---

[3] In fact, sentencing disparities that existed in the federal system before the passage of the Guidelines were apparently minor or statistically insignificant and not based on impermissible factors such as race and ethnicity. *See* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 105-42 (1998). "It bears emphasizing . . . that an examination of . . . early studies and other data from the pre-Guidelines period belies the notion that sentencing in the federal courts was 'shameful,' 'lawless,' or 'arbitrary.'" *Id.* at 111.

and as a remedy, excised 18 U.S.C. § 3553(b). In so doing, the Court deleted the mandatory feature of the Guidelines, thereby making them "effectively advisory." *Id.* at 245. Henceforth, the Guidelines are to be simply one of seven factors a sentencing court must consider in fashioning a just sentence. However, many trial courts and courts of appeals continued to apply the Guidelines as if they were mandatory, affording them a presumption of reasonableness.

In *Rita v. United States*, 127 S.Ct. 2456 (2007), this Court addressed this issue and concluded a Guideline sentence *may* be regarded by a reviewing court to be a presumptively reasonable sentence because the sentence was the result of the decision by the sentencing court that comported with a Guideline sentence promulgated by the Sentencing Commission allegedly based on empirical evidence. *Id.* at 2463.

While *amici* disagree with the *Rita* decision, this Court nevertheless made it clear that the presumption of reasonableness was not mandatory for a reviewing court. More importantly, the Court reiterated that "appellate 'reasonableness' review merely asks whether the trial court *abused its discretion*." *Id.* at 2465. Moreover, the presumption does not apply to the sentencing court which need only consider the Guideline sentence as one of several factors: "A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence." *Id.* (emphasis in original). *Rita* posited several scenarios why a sentencing court could justifiably impose a non-Guideline sentence, including the assessment that "the Guidelines sentence itself fails properly to reflect 3553(a) consideration, or perhaps because the case warrants a different sentence regardless [of

the Guidelines]." *Id.*

To use administrative law parlance, the Guidelines are not to be given any *Chevron* deference; at best, they warrant only *Skidmore*-type deference.[4] In short, the Guidelines are to be considered by the sentencing court only for what they are worth in that particular case for that particular offender, and as only one of several sentencing factors, without enjoying any presumption of reasonableness.

Consequently, while district courts must certainly provide reasons for their sentence to aid appellate review, their decision is to be afforded great deference because of their familiarity with the defendant and the facts in the case. Sentencing judges should not be required to show extraordinary circumstances in a proportional manner as the sentence imposed deviates from the Guideline sentence. This is particularly true when, as will be discussed further, Guideline sentences inordinately call for harsh prison sentences, and thus, any probation or non-prison sentence, regardless of their length or strict conditions, would mathematically speaking be a 100 percent departure from a Sentencing Guideline as the court of appeals below indicated. Under the proportional review standard adopted by the court below and other courts of appeals, such

---

[4] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency ruling, "while not controlling upon the courts by reasons of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

otherwise reasonable non-prison sentences would be subject to reversal.

A. The Guidelines Are Unreasonable Because They Call For Excessively Harsh Sentences Compared to Sentences Imposed in the Pre-Guideline Era.

The reason the Guidelines often generate excessive sentences is primarily due to design defects in their promulgation. All of the sentencing factors of § 3553(a) were not fully taken into account, particularly those regarding offender characteristics, nor could they be. Under the Guidelines before *Booker*, judges could not fully consider a defendant's personal situation, family responsibilities, education, health status, military service, charitable and community service activities, and the like, as they did prior to the promulgation of the Guidelines.[5] The "one-size-fits-all" approach of the Guidelines, which were purportedly designed to reduce unwarranted sentencing disparity, often spawned more of it.

More significantly, the Guidelines are fundamentally flawed because they regularly dictate prison terms that are several *times* longer than terms actually served in the pre-Guideline era for the same offense. Because the SRA abolished parole, offenders will no longer be released after serving only one-third of their time. More importantly, the Guidelines directly violate Congress's directive in 28 U.S.C. § 994(j) -- that probation be the norm for non-violent first offenders -- by greatly reducing the availability

---

[5] *Rita* acknowledged this argument, but expressly declined to address it because it was not raised in the court of appeals. *Id.* at 2470.

of probation and other non-prison punishments for numerous offenses. The Commission never adequately explained this radical departure from the pre-Guideline sentencing practice. The SRA was not a "get-tough-on-crime" statute; rather, its goal was to provide truth-in-sentencing with a determinate sentencing scheme, and to achieve a measure of uniformity, but not to impose uniformly harsh and excessive sentences across-the-board.

The fundamental defect with the Guidelines is that they were drafted without the Commission hewing to Congressional commands. Congress intended that "for the most part the average time served [under the Guidelines] should be similar to that served today in like cases." S. Rep. No. 225, *supra*, at 116. *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17 (1988) (Guidelines were primarily to be based on "typical, or average, actual past practice"). In addition, Congress directed the Commission to develop the Guidelines to "reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).[6] But thanks to the flawed Guidelines, our nation's

---

[6] The history of this provision suggests that prison was to be used for the principal purpose of incapacitation (specific deterrence) or retribution when the defendant would be a danger to the community if left free to remain at large. 130 Cong. Rec. S542-43 (daily ed. Jan. 31, 1984) (remarks of Senator Nunn). Attorney General Alberto Gonzales apparently shares this view, having opined during his confirmation hearings two years ago that incarceration is best suited "for people who commit violent crimes and are career criminals." Transcript of Senate Judiciary Committee hearings on the nomination of Alberto R. Gonzales to be Attorney General *accessed at*

prisons are packed with inmates serving sentences that far exceed the typical or average sentence imposed and served in the pre-Guideline era, including sentences by first offenders who have been convicted of non-violent and minor offenses.

The source material allegedly utilized by the Commission in determining past sentencing practices include a 1,279 page report summarizing some 40,000 sentences imposed from January 1, 1984 to February 28, 1985. *Punishments Imposed on Federal Offenders* (Federal Judicial Center 1986). In reviewing the sentences imposed for various categories of offenses, one is struck by how frequently probation was imposed in the pre-Guideline era. This practice properly reflected the goals of parsimony in meeting the purposes of punishment, as well as considering the "kind of sentences available" as required by § 3553(a)(3).[7] Furthermore, the relevant pre-Guideline sentencing data is not the prison term imposed, but rather

---

http://sentencing.typepad.com/sentencing_law_and_policy/files/gonzales_hearing_excerpts_part_1.doc. Petitioner Gall did not commit a violent crime and is not a career criminal or a danger to the community.

[7] For example, convictions for the non-violent crime of mail or wire fraud resulted in probation sentences in 57.5 percent of the cases. *Id.* at 3-250, Table 3-58. Many of these probation sentences included fines, community service, and restitution. For those convicted for making a false statement within the jurisdiction of a federal agency who had no prior convictions, 76 percent were given probation. *Id.* at 3-222, Table 3-75. For drug offenses on the relatively small scale as that committed by Gall, converting the quantity of the MDMA drug in question to less than 200 pounds of marijuana under the Guideline's formula, almost 33 percent of first offenders received probation. *Id.* at 4-160, Table 4-38. Only *one* defendant served above the minimum 30 months called for by the Guidelines in this case. *Id.*

the actual amount of time served, due to the fact that parole was routinely given after an inmate served one-third or less of his time; on the other hand, a probation sentence under the Guidelines is rarely an available punishment, even for first offenders.[8] This occurs because the Commission structured the Guidelines in such a way that Base Offense Level scores can be easily increased by adding Specific Offense Characteristics that take probation off the table as a sentencing option.[9]

---

[8] The Court in *Rita* may have misspoke when it stated that "the Commission took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past. . . ." *Rita* at 2464. The presentence reports, prepared by the probation office, only give background on the offender and the offense and provide guidance to the sentencing court as to what sentences *should be* imposed in a particular case. As for what the judges "had done in the past," the sentences imposed by the judges are not the relevant metric to be used in fashioning the Guidelines (except for sentences of probation); rather, the relevant metric is the length of the sentence actually served. To be sure, the Commission had such sentencing data before it. The real question is what did the Commission do with the data in devising the Guidelines, and how good of a job did it do in meeting the Congressional directives and sentencing factors in 18 U.S.C. § 3553(a).

[9] According to a survey conducted by the Federal Judicial Center, nearly two-thirds of the judges contacted (65.8 percent) indicated that the Guidelines do *not* appropriately identify offenders who should be eligible for alternatives to incarceration; 60.2 percent of Chief Probation Officers similarly agree. *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 101 (1997). In addition, 84.7 percent of the judges surveyed agreed that Congress should expand the so-called "safety valve" provision (18 U.S.C. § 3553(f) and USSG §5C1.2) so that *more* defendants would be eligible for sentence reductions under its provisions. *Id.* at 69. These views by experienced sentencing experts are further evidence of the structural design flaws of the Guidelines and their failure to reflect the feedback

More significantly, under the pre-Guideline parole system, the normal practice was that defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed, with these inmates receiving their initial parole hearing within 120 days after incarceration. 18 U.S.C. § 4205(a) (repealed 1984). Indeed, for those inmates who were considered "very good" candidates for parole, and whose criminal offense level was a Category Three or less,[10] the customary total time to be served in prison before being paroled would be 10 months or less. *See* Paroling Policy Guidelines for Decisionmaking, 28 C.F.R. 2.20 (Parole Guideline chart attached hereto as App. 1a). In short, even if Gall had been sentenced to prison instead of probation in the pre-Guideline era, he likely would have been released after serving a minimal time of a few months. But as previously noted, the Gall's Guideline sentence of 30-37 months translates into an excessive pre-Guideline sentence of some 7-9 *years*.

Unduly harsh sentences are common under the flawed Guideline system and have been unfairly imposed over the years even on those who committed even minor regulatory offenses. This is a particular problem in the environmental area. Consider the case of *United States v.*

---

from the judiciary about the need to revise them. For an excellent discussion of this issue, *see* Brief Amici Curiae of the Federal Public and Community Defenders, *et al.*

[10] For those crimes not listed in specific categories in the parole guidelines, the general rule is that for crimes where the maximum sentence is less than 2 years, the offense level is Category One; for statutes providing sentences from 2 to 3 years, the level is Category Two; and for sentences of 4 to 5 years, the level is Category Three. 28 C.F.R. 2.20, Chapter 12 Miscellaneous Offenses.

McNab, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004), where the sentencing court was forced to mete out draconian 97-month prison sentences to first offenders for the "crime" of violating the Lacey Act by importing frozen seafood from Honduras in clear plastic bags instead of cardboard boxes. This shipping practice was alleged by the government to have violated an obscure Honduran regulation that even the Honduran government argued was invalid and could not be enforced in its own country. The length of the sentence was artificially dictated by the market value of the large quantity of seafood shipped in this innocuous manner, even though the defendants' profits as seafood importers and brokers were a small fraction of the seafood's aggregate value.

Applying the general rule of thumb to multiply a Guideline sentence by three to gauge its pre-Guideline severity, the 97-month sentences for the first offenders in *McNab* translate into surreal sentences of 297 months, or almost 25 years.[11] In order to stretch the crime to make it fit the 97-month punishment (which was at the low end of the Guideline range), the sentencing court had to carve out a 37-month portion from a 60-month maximum sentence from one of the charges, and stack it on top of a maximum 60-month sentence from another charge, making the two sentences run consecutively (with the other counts running concurrently). *See* Blandford Pet. at 7; Pet. App. at 173a, No. 03-627, *cert. denied*, 540 U.S. 1177 (2004).

---

[11] *See* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, Legal Times (Feb. 16, 2004). In addition, such extreme sentences of 25 years and even more have in fact been recently imposed on major white collar offenders. *See* Amicus Curiae Brief for the New York Counsel of Defense Lawyers at 27-28.

These kinds of harsh sentences clearly violate the parsimony principle and every other sentencing factor in 18 U.S.C. § 3553(a), including the need "to promote respect for the law" as provided in § 3553(a)(2)(A). Neither the defendant nor society can have any "respect for the law" when the Guidelines mechanistically produce unduly harsh punishments. Indeed, the opposite is true: rigid Guideline sentences have been met with scorn and contempt by judges and the public alike.[12]

To be sure, Congress authorized the Sentencing Commission in 28 U.S.C. § 994(m) to depart from past sentencing practice if sentences were too lenient for serious crimes, but Commission Policy is that "when departures [from pre-Guideline sentencing practice] are substantial, the *reasons for departure will be specified.*" Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, *reprinted in* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 50 (1988) (emphasis added). However, the record is sparse if not blank as to what the Commission's articulated reasons were for departing from past sentencing practice on an offense by offense basis. This is particularly

---

[12] Federal judges have repeatedly complained that the Guidelines' "wholly mechanical sentence computation" reduces the judiciary to "automaton[s]," "rubber-stamp bureaucrat[s]," or "accountant[s]." Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Policy Analysis, Nov. 1, 2002 at 28 n.87 (collecting cases and other sources); *see also United States v. Green*, 346 F. Supp. 2d 259, 281 (D. Mass. 2004) ("To call our present federal sentencing structure a 'guidelines' system suggests that the district judge still plays a central role. She does not. Other than determining the controlling sentencing factors . . . , the district judge's role is purely mechanistic, applying arithmetically the sentencing factors . . . .").

true for sentences meted out for certain regulatory infractions when the pre-Guideline practice was typically probation, remediation, community service, and fines.[13] It appears that the Commission did not do all of its homework, as required by Congress, before sharply departing from past sentencing practice.

When a statute clearly commands an agency to undertake certain studies before promulgating regulations, and the agency's own policy requires it to articulate reasons for departing from the data in establishing the regulation, the courts are required to set aside the regulations when the agency has done neither. For example, in *Envtl Def. Fund, Inc. v. EPA*, 898 F.2d 183 (D.C. Cir. 1990), the court was called upon to determine whether the EPA had properly followed Congressional directives in setting certain emission levels [compare to Guideline levels] and determining whether they were stringent enough [compare to the parsimony principle]. When it found the record was barren, the court struck down the rule, stating, "[w]e cannot sustain [agency] action merely on the basis of interpretive theories that the agency *might have adopted* and findings that (perhaps) it *might have made*." *Id.* at 189 (emphasis added). *See also Chamber of Commerce v. Securities and Exchange Comm'n*, 412 F.3d 133 (D.C. Cir. 2005) (agency rule invalidated for not taking costs into account as required

---

[13] In the few cases where incarceration was imposed in the pre-Guideline era for environmental offenses, the length of the prison sentences *imposed* (not the length actually served) were usually for a few weeks or months, coupled with fines and remediation, all of which adequately served the principles of punishment and deterrence. *See generally* U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver *Summary of Criminal Prosecutions Resulting From Environmental Investigations* (May 31, 1991).

by statute or considering alternatives). As this Court has stressed, reviewing courts must be sure that an agency has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

Here, the Guidelines, just like other agency rules, are vulnerable from both a procedural and substantive challenge. *See* Ronald F. Wright, *Sentences, Bureaucrats, and the Administrative Law, Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 3 (1991); *id.* at 89 ("sentencing courts should remain receptive to offenders' objections to the procedures employed by the Commission in promulgating guidelines"). In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court unanimously struck down the applicable guideline in that case, USSG §2J1.6, and remanded the case to the district court for resentencing as if the Guideline did not exist. The court did so because the Guideline in question was "not sufficiently reasonable and violate[d] the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the U.S. Sentencing Commission to any other regulatory agency, the court concluded that the standard of review for agency regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981)). But as previously discussed, no *Chevron* deference is due to the Commission's Guidelines, and as *Rita* made clear, a Guideline sentence does not enjoy a presumption of reasonableness by the sentencing court.

B. The Guidelines Are Flawed Because They Mandate Statutory Maximum Punishments For First Offenders In Violation of the Parsimony Principle.

Another major defect in the Guidelines is that in a number of cases they require the sentencing judge to impose the statutory maximum sentence, despite all the other § 3553(a) factors counselling otherwise. This result clearly violates the parsimony provision because the Guidelines call for a prison sentence greater than what Congress declared should be the statutory maximum for the worst offender. Indeed, the Commission even contemplated that this bizarre result would occur by promulgating a specific application Guideline that would lop off any excess of the Guideline sentence that is greater than the statutory maximum. USSG §5G1.1(a).[14]

An excellent case study of this troubling phenomenon, which covers both pre- and post-*Booker* analysis, is *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004), *cert. pending*, No. 06-378. Mr. Thurston was charged with one count of conspiracy under 18 U.S.C. § 371 with respect to his company's medicare billing practice for laboratory blood testing. His co-defendant, who the district court found was the prime architect of the challenged practice, was offered a plea bargain that he accepted. He was allowed to plead nolo contendere, did not furnish any assistance to the government, and received three years of probation.

---

[14] "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." USSG §5G1.1(a).

The government offered a similar plea deal to Thurston. Thurston rejected the offer because he believed he was innocent and exercised his constitutional right to stand trial. Two defense expert witnesses testified at trial that the challenged blood testing practice was a lawful industry practice. *Id.* at 60. There was no allegation or finding that Mr. Thurston financially benefited personally from the company's billing practice. Nevertheless, a jury found him guilty of one count of conspiracy, which carries a maximum sentence of five years or 60 months. 18 U.S.C. § 371.

Although the government readily accepted a probationary sentence as suitable punishment for the more culpable co-defendant, and thus tacitly acknowledged that it served the principles of punishment as provided by § 3553(a), the Guideline sentence for Thurston was computed as 78 to 97 months. But because the statutory maximum punishment was 60 months, the excess had to be trimmed in fine Procrustean fashion to fit the statutory maximum. The district court departed from the Guidelines and imposed a reasonable split six-month term -- three-months to be served in prison and three months to be served by home detention -- followed by 21 more months of supervised release. The court imposed this sentence in order to avoid a gross disparity with the probation sentence given to the more culpable co-defendant, and because of Thurston's civic and charitable works. This reasonable sentence "outraged the prosecutors" and the government appealed. 358 F.3d at 55.

The First Circuit reversed, finding that the then mandatory Guidelines "bind us and they bind the district court," and therefore, downward departures for unwarranted disparities "in sentences among co-defendants was

impermissible." *Id.* at 78. Mr. Thurston would have to return to prison and serve the maximum five years (which is effectively a pre-Guideline sentence of 15 *years*). Thurston sought review in this Court, which summarily vacated the judgment and remanded following its *Booker* decision. *Booker*, 543 U.S. 1097 (2005).

On remand, a different sentencing judge[15] held a searching two-day hearing. At the conclusion, the court decided to impose the original 6-month split sentence, carefully explaining his reasons. Significantly, the court concluded that the sentence it imposed on Thurston was "sufficient and no more than necessary to serve the statutory purposes" of § 3553(a). *See* Thurston Pet. App. at 188a, No. 06-378. This sentence apparently outraged the prosecutors yet again and the government appealed Thurston's sentence for a second time.

The First Circuit reviewed Thurston's sentence this time for reasonableness under the post-*Booker* voluntary guidelines and reversed Thurston's sentence again. The court of appeals held that the sentence was unreasonable, in part, because, in the court's view, the Guidelines -- which called for a sentence that was much longer than the statutory maximum for a first offender --- are an "important consideration" for a sentencing court because they have the "imprimatur" of an alleged "expert agency." *United States v. Thurston*, 456 F.3d 211, 215 (1st Cir. 2006). It further held that any sentence imposed on remand that falls below

---

[15] The original judge recused himself from the case on remand, apparently due to his disgust for the harsh and inflexible Guidelines. Other judges have done the same in other cases remanded for resentencing. *See, e.g., United States v. Likens*, 2007 U.S. Dist. LEXIS 38925 (D. Iowa 2007).

a three-year prison term (an effective pre-Guideline sentence of *9 years*) would be unreasonably lenient and would presumably be reversed for third time. *Id.* at 220. Astonishingly, the court of appeals further opined that if it were the sentencing authority, it would impose a sentence "at or near" the statutory maximum term of five years.[16] *Id.*

Congress provided that the *maximum* prison sentence for Thurston's crime should be five years in prison. Yet the Guidelines dictated a 78 to 97 month sentence for Thurston, a first-offender. Applying an uncapped Guideline sentence in the case would result in a sentence that would be approximately 30 to 60 percent *longer* than what Congress intended should be meted out to the *worst* offender for the *worst* possible case for the underlying object of the conspiracy. In short, even if the sentence is capped, the statutory *maximum* sentence that *could* be imposed became the mandatory *minimum* sentence that were called for by the Guidelines. *Amici* urge that the instant case be decided in a way that would put an end to this kind of *de novo* second-guessing by the appellate courts.

Other absurd examples of white collar cases where the minimum Guideline sentence far exceeds the statutory maximum are discussed in the Amicus Brief of the New

---

[16] Not only do the Guidelines dictate a patently harsh and unreasonable sentence, they run directly counter to Congress's directions to the Commission that "a term of imprisonment at or near the maximum term authorized for categories of defendants" be reserved for the class of thrice-convicted felons who have been convicted of crimes of violence and/or certain drug offenses. 28 U.S.C. § 994(h). Mr. Thurston, a pillar in this community, is a first-offender who was not convicted of a crime of violence or drug offense.

York Council of Defense Lawyers. *See* NYCDL Br. at 28-29 (citing, *inter alia, United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006), where Judge Rakoff observed that the guideline calculations have "so run amok that [they] are patently absurd on their face.")

C. The Extraordinary Circumstances Test Would Discourage Probation And Non-Prison Sentences And Violate The Congressional Directive That Guideline Sentences Should Reduce The Likelihood Of Prison Overcrowding.

As discussed earlier, the Guidelines do not faithfully adhere to Congress's command that probation should be the norm for non-violent first offenders for many offenses. The Guidelines are also flawed because they violate the Congressional directive that they "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . ." 28 U.S.C. § 994(g). In fact, the Guidelines appear to have been formulated to *maximize* the likelihood that the prison population would exceed the capacity of federal prisons. Because the flawed Guidelines routinely generate unduly harsh prison sentences, it should come as no surprise that the federal prison population has far exceeded its capacity by over *40 percent*. U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7.

One of the § 3553(a) sentencing factors that courts are required to consider is the "kind of sentences available" 18 U.S.C. § 3553(a)(3). In addition to incarceration, for which the Guidelines are heavily skewed, there are a variety of sentencing options available to a sentencing judge, such as probation (supervised or unsupervised); home

confinement (including electronic monitoring, visitor restrictions, and other conditions deemed appropriate);[17] halfway houses; community service; restitution; forfeiture; and monetary fines; or a sentencing package involving a mixture of all these sanctions.

To be sure, while the substantial three-year probationary sentence in this case is a reasonable one, there could have been other non-prison sentences that would also fall within the range of reasonableness; but, under the extraordinary circumstances test adopted by the court below, they all would be subject to reversal as well. For example, the sentencing court could have imposed a non-prison sentence consisting of a period of home confinement, community service appropriate to the offense (e.g., working in a drug rehabilitation facility for teens), and/or a fine in an amount that reflected the defendant's ill-gotten profits. Because such a sentence is a 100% deviation from the 30-37 month Guideline sentence, the extraordinary circumstances test would allow courts of appeals to second-guess the judge's discretion on a *de novo* standard. *See* NYCDL Brief at 14-15 (citing numerous cases where non-prison sentences, including home detention, probation, fines, and the like, were reversed by appellate courts).

Regrettably, many of these sentencing options are not provided for under the Guidelines, even though a non-prison sentence comports with the parsimony provision in many cases. Violations of any of the numerous conditions of probation (*e.g.*, drug testing, employment, restitution,

---

[17] For a good description of the costs and benefits of home confinement, see Paul J. Hofer and Barbara S. Meierhoefer, *Home Confinement: An Evolving Sanction in the Federal Criminal Justice System*, Federal Judicial Center (1987).

community service, and the like) will trigger probation revocation proceedings, and if warranted, incarceration will follow. Unfortunately, errors for imposing excessive prison terms in violation of the parsimony provision cannot be corrected because parole has been abolished.

CONCLUSION

For the foregoing reasons and those of petitioner and his other amici, the judgment of the court of appeal should be reversed.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Date: July 26, 2007

APPENDIX

GUIDELINES FOR DECISIONMAKING

[Guidelines for decisionmaking, customary total time to be served before release (including jail time)]

Offense Characteristics: Severity of offense behavior	Offender characteristics: Parole prognosis (salient factor score 1998) Very good (10 to 8)	Good (7 to 6)	Fair (5 to 4)	Poor (3 to 0)
	Guideline range (months)			
Category:				
1	[</=]=4	[</=]=8	8-12	12-16
2	[</=]=6	[</=]=10	12-16	16-22
3	[</=]=10	12-16	18-24	24-32
4	12-18	20-26	26-34	34-44
5	24-36	36-48	48-60	60-72
6	40-52	52-64	64-78	78-100
7	52-80	64-92	78-110	100-148
8	100+	120+	150+	180+

Source: 28 C.F.R. 2.20 Paroling policy guidelines (footnote omitted)